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SUPREME COURT, U.S.

No. 07-980

IN THE
Supreme Court of the United States

MICHAEL FOGARTY AND TERRIE FRITZ,
Petitioners,

v.

ALFRED MILTON EVANS, SOUTHEASTERN OKLAHOMA FAMILY SERVICES, INC., RUSTLING WINDS, INC., MORNING STAR MENTAL HEALTH SERVICES, INC., DIVERSIFIED FAMILY SERVICES, INC., SERENITY SPRINGS MENTAL HEALTH SERVICES, L.L.C., JCH, INC., NEAL THRIFT, NANCY GRAVES-THRIFT, JOHN MAJORS, CYNTHIA MAJORS, CHARLES PARKHURST, MARY PARKHURST, LEROY WHEELER, AND JOEL HOLCOMB,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Petition in this case presents three important questions involving the circumstances under which public officials responsible for administering complex government programs may be subjected to ruinous personal liability when sued by contractors disappointed by the effect of generally applicable efforts to reduce the cost of those programs. Having faced two trials in this case, Petitioners, two state officials responsible for running Oklahoma's Medicaid program, stand liable for nearly $1 million in punitive damages that were reinstated by the court of appeals when it reversed the district court's new trial order. Petitioners also face the prospect of yet a third trial on compensatory damages for certain Respondents and remitittur proceedings on awards to others because the court of appeals agreed that the compensatory awards to those Respondents (by the same jury that issued the punitive damages award) were "speculative, remote, imaginary, or impossible of ascertainment." Pet. App. 52a.

The discussion in Respondents' brief in opposition confirms that the courts of appeals are divided on two of the questions presented, involving the circumstances under which the courts deem a qualified immunity defense waived, and the degree of scrutiny that the appellate courts apply to their review of a district court's new trial grant. The importance of these questions is underscored by the third question, which asks whether the court of appeals was correct to reinstate the nearly $1 million punitive damages award while remitting or

remanding almost the entire compensatory damages award.

ARGUMENT

1. The qualified immunity question presented in the Petition warrants this Court's review.

The Tenth Circuit held that although Petitioners raised qualified immunity in motions to dismiss and in their answers, they waived the defense by omitting it from the pretrial order, and thus were not entitled to consideration of the issue on appeal. Pet. App. 16a-17a n.9. As the Petition shows (Pet. 14-21), this ruling conflicts with three courts of appeals, which have held that affirmative defenses not in the pretrial order are not waived when they have already been denied by the trial court, *Calderon* v. *Witvoet*, 999 F.2d 1101, 1108 (7th Cir. 1993), and that qualified immunity in particular is not waived when not listed in the pretrial order, *Guzman-Rivera* v. *Rivera-Cruz*, 98 F.3d 664, 669 (1st Cir. 1996); *Spann* v. *Rainey*, 987 F.2d 1110, 1113 (5th Cir. 1993). The ruling is also in tension with decisions of courts of appeals that have reviewed qualified immunity on appeal although the defense was not properly raised below. *Alexander* v. *Fulton County, Ga.*, 207 F.3d 1303, 1320 & n. 10 (11th Cir. 2000); *Kelly* v. *City of Oakland*, 198 F.3d 779, 784 (9th Cir. 1999); *O'Connor* v. *Huard*, 117 F.3d 12, 17 (1st Cir. 1997).

A. The qualified immunity question is not moot.

Contrary to Respondents' arguments, the Tenth Circuit's reinstatement of the first trial verdict

(which Petitioners also challenge) does not moot the qualified immunity question. In the court of appeals, Petitioners sought review of both the district court's denial of their motions to dismiss based on qualified immunity *before* the first trial as well as its refusal to consider a summary judgment motion *after* the first trial and before the second trial. Fogarty App. Br. at 22-25; Fritz App. Br. at 41-44. Petitioners argued that the district court improperly denied the defense, and that the court of appeals should hold that they were entitled to qualified immunity. Fogarty App. Br. at 22-25; Fritz App. Br. at 41-44.

That the trial court's qualified immunity rulings before and after the first trial were both at issue in the Tenth Circuit is shown by that court's discussion of both issues. *See* Pet. App. 16a-17a n. 9. The Tenth Circuit held that Petitioners' qualified immunity defense *before* the first trial was waived because it was not included in the pretrial order, and declined to decide, in light of its reversal of the new trial grant, whether Petitioners' qualified immunity motion *after* the first trial should have been granted. *Id.*

In any case, even if the Tenth Circuit had addressed qualified immunity only with respect to the second trial, Petitioners have also challenged the court's conclusion that the grant of a new trial was in error. The issue is therefore appropriately presented to this Court for review.

B. The circuits are split on the qualified immunity issue.

The court's holding that qualified immunity was waived before the first trial and its accordant

refusal to consider the defense implicate the circuit split articulated in the Petition. Respondents recognize that the courts of appeals differ as to the circumstances under which they will deem qualified immunity waived, admitting that "the stage at which qualified immunity is deemed waived varies, depending on the court," and that "[s]ome courts allow defendants to assert qualified immunity" at stages of the proceedings when "others deem the defense waived." Opp. 16. Indeed, as shown in the Petition, three courts of appeals, contrary to the Tenth Circuit here, would have found that Petitioners did not waive the defense by failing to include it in the pretrial order. An additional two circuits would have reviewed Petitioners' qualified immunity claim for clear error.

The division between the Tenth Circuit and other courts of appeals is most clearly demonstrated in the Seventh Circuit's decisions holding that "[n]othing in the Rules of Civil Procedure tells counsel that to preserve issues for appeal they must insert into the pretrial order contentions that have already been rejected by the judge." *Calderon*, 999 F.2d at 1108; *see also Nagy* v. *Riblet Prods. Corp.*, 79 F.3d 572, 575 (7th Cir. 1996). Respondents do not attempt to distinguish these cases, suggesting instead that the pretrial order was not dispositive and that "the Tenth Circuit found that Petitioners had waived [qualified immunity] because they had neglected to press it *at every opportunity*." Opp. 5 (emphasis added). But the court of appeals' opinion was clear that "Defendants must diligently raise the defense during pretrial proceedings *and ensure it is included in the pretrial order*." Pet. App. 17a n.9

(emphasis added). Because Petitioners did raise the defense in their answers and in motions to dismiss, the court necessarily found the omission of the defense from the pretrial order waived the issue. Moreover, contrary to Respondent's suggestion (Opp. 10), nothing in the rules of civil procedure requires a party to file a motion for summary judgment to preserve its defenses. *See* Fed. R. Civ. P. 56(b).

The holding also conflicts with decisions of the First and Fifth Circuits, which have held that qualified immunity was not waived when not listed in the pretrial order. *Guzman-Rivera*, 98 F.3d at 669; *Spann*, 987 F.2d at 1113. Respondents' attempts to distinguish these cases are unpersuasive.

In *Guzman-Rivera*, the defendants "failed to mention qualified immunity" in the pretrial order, asserting the defense for the first time days before a trial was set to begin. 98 F.3d at 669. The First Circuit held that the defendants' delay justified deeming qualified immunity waived for the pretrial stage of the case, but stated that its "decision does not imply, however, that the defense has been waived for other stages of the litigation," including trial and presumably appeal. *Id.* Respondents attempt to distinguish the decision by asserting that Petitioners failed to raise qualified immunity at trial (Opp. 12-13), but *Guzman-Rivera* was decided on interlocutory appeal before trial. *Guzman-Rivera* thus held that qualified immunity would still be available to defendants in later stages of the case despite its omission from the pretrial order, while the Tenth Circuit's decision here was that such omission waived the defense for the remainder of the proceedings.

Respondents' discussion of the First Circuit's decision in *O'Connor* v. *Huard* is even less persuasive. Respondents agree that the First Circuit "reviewed the denial [of qualified immunity] for plain error" because "the defendant had not properly preserved the defense." Opp. 13 (emphasis omitted). Respondents do not say how that ruling—an appellate court's review of a denial of qualified immunity on the merits despite finding it was not properly raised—does not conflict with the Tenth Circuit's decision holding that the failure to properly preserve the defense in a pretrial order foreclosed review.

In *Spann*, the Fifth Circuit similarly reviewed the denial of a qualified immunity defense after trial though it was not listed in the pretrial order. 987 F.2d at 1113-14 n.6. The court held that the interests that underlie qualified immunity are still served by allowing defendants to assert the defense after they have gone through discovery and a first trial. *Id.* at 1114. Importantly, while the district court in *Spann*, like the district court here, found that the defendant waived qualified immunity by failing to list it specifically in the pretrial order, the Fifth Circuit found this did *not* waive the defense. *Id.* at 1114 n.6.

Respondents' arguments regarding the Ninth and Eleventh Circuits in *Alexander* v. *Fulton County, Georgia*, and *Kelly* v. *City of Oakland* are likewise unavailing. Unlike the Tenth Circuit here, in both cases the courts reached the merits of a qualified immunity issue despite findings in the courts below that the issue was not properly raised. While Respondents are correct that the defendants in those

cases attempted to bring the issue before the court at different times than did Petitioners, that does not change the fact that in the Ninth or Eleventh Circuit, Petitioners would have received at least a plain error review of whether they were entitled to qualified immunity, while in the Tenth Circuit, they received no appellate review at all.

C. Petitioners are entitled to qualified immunity.

Respondents are incorrect that the Tenth Circuit's refusal to consider the merits of Petitioner's entitlement to qualified immunity was harmless. *See* Opp. 17-20.[1]

While Petitioners do not dispute that there is a clearly established right to petition the government, there is no clearly established right that lobbying activities exempt Respondents from the application of reasonable measures intended to reduce the rising costs of an important and complex government program. Petitioners, who are responsible for just such a program, exemplify the kind of public officials for whom qualified immunity was created, and the Respondents' allegations exemplify the type of discretionary decisions that are ordinarily shielded from liability by qualified immunity.

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[1] The district court's initial position that there was an "uncanny correlation" between Respondent's speech and retaliatory audits was based on evidence that the district court and even the Tenth Circuit later rejected as "simply too speculative to prove personal participation or causation as to any of the defendants." Pet. App. 31a.

Medicaid, the primary source of health care for the needy in the United States, is one of the largest and fastest growing programs of the federal government and of the States. Managing that growth, and controlling its cost, is among the most difficult and important issues facing State governments today. Officials like Petitioners are the States' first line of defense against spiraling costs, and bear the initial responsibility for increasing the efficiency and reducing the costs of their State's program. Even as State officials seek to control the costs of Medicaid, however, their efforts are opposed by Medicaid providers seeking an ever greater share of the pie. In recent years, providers like Respondents have increasingly turned to the courts when they are disappointed that their share of Medicaid funds is less than they desire. Providers have sued State Medicaid agencies and also the officials who administer those agencies, in their official and personal capacities. *See, e.g.*, *Pediatric Specialty Care, Inc.* v. *Arkansas Dep't of Human Servs.*, 293 F.3d 472 (8th Cir. 2002), *order inviting the Solicitor General to file a brief expressing the views of the United States sub nom Selig* v. *Pediatric Specialty Care*, 127 S.Ct. 1356 (Feb. 20, 2007).

Absent a meaningful application of qualified immunity principles, such suits have the potential to materially impede States' efforts to deal with rising Medicaid costs. Accordingly, the Tenth Circuit's holding that Petitioners' qualified immunity defense was waived is far from harmless.

2. The circuits are split on the standard of review for overturning a district court's new trial grant.

The petition presents a second question upon which the courts of appeals are split; namely, whether a court of appeals should employ closer scrutiny when reviewing a district court's grant of a motion for a new trial than the ordinary abuse of discretion standard. The Petition shows that the Tenth Circuit, in accord with the decisions of four other circuits, applies more stringent scrutiny, while five circuits apply an ordinary abuse of discretion standard. Pet. 21-24.[2] Respondents attempt to paint the circuits' schism as a mere semantic difference, but the Brief in Opposition demonstrates that the opposite is true: While the courts of appeals all *label* their standard of review "abuse of discretion," the *substance* of the courts' review varies significantly. Indeed, Respondents admit that "some circuit courts examine the evidence more closely than others" when reviewing a grant of a new trial. Opp. 24. As the Eleventh Circuit candidly remarked, "the label 'abuse of discretion' belies the standard of review that we actually apply to grants of motions for a new trial." *Butcher* v. *United States*, 368 F.3d 1290, 1297 (11th Cir. 2004).

Respondents attempt to smooth over the differing standards that the courts of appeals apply

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[2] In addition, Petitioners agree that the Third Circuit applies "a closer degree of scrutiny," and should be added to the courts that agree with the Tenth Circuit. *See* Opp. 25-26, quoting *Wilburn* v. *Maritrans GP*, 139 F.3d 350, 363 (3d Cir. 1998).

by asserting that ordinary abuse of discretion review is actually the same as the "more stringent scrutiny" (Tenth Circuit), the "closer degree of scrutiny," (Third and Sixth Circuits), the "more searching inquiry" (D.C. Circuit), and the review that is "not much different" from *de novo* (Eleventh Circuit), applied by certain courts of appeals. *See* Pet. 25-27; Opp. 25-26.

While acknowledging these courts' heightened standard of review, Respondents' arguments with regard to other circuits miss the mark. Their First Circuit authority is irrelevant to the issue presented here because it is a criminal case. *See* Opp. 24, citing *United States* v. *Rivera Rangel*, 396 F.3d 476 (1st Cir. 2005). Criminal cases are governed by an entirely different set of rules, and implicate constitutional rights of the accused that are irrelevant in civil trials.

Respondents quote the Second Circuit's statement that it applies "particularly close" scrutiny out of context; in the same sentence from which Respondents quote, the court states that its standard is whether there is "'*any basis in reason* for the trial judge's conclusion as to the weight of the evidence.'" *Crane* v. *Consol. Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir. 1984) (emphasis added); *see also id.* (affirming new trial grant because "we cannot say that there was 'no basis in reason'" for the ruling). The Second Circuit does not apply the close scrutiny of the Tenth and other circuits.

Respondents discussion of the Fourth and Fifth Circuits (Opp. 26-27) lends no support to their contention that these circuits apply heightened scrutiny, because Respondents cite only unpublished

decisions, not binding on future panels, that are contrary to those courts' stated standards (*see* Pet. 24).

Moreover, Respondents admit that the Seventh Circuit expressly "abandon[ed]," in light of this Court's ruling in *Gasperini*, the practice of examining new trial grants more closely than denials, *Medcom Holding Co.* v. *Baxter Travenol Labs.*, 106 F.3d 1388, 1397 & n.3 (7th Cir. 1997), and that the Eighth Circuit "does not speak in terms of 'closer scrutiny' or 'more stringent scrutiny.'" Opp. 27-28.

Accordingly, even under Respondents' view, "some circuit courts examine the evidence more closely than others" when reviewing a district court's decision to grant a new trial. Opp. 24. Respondents attempt to minimize the differences between the courts, but the Tenth Circuit's application of "more stringent scrutiny" made a difference in this case. *See* Pet. 12-13. The court of appeals' opinion, and its decisions to grant judgment as a matter of law and to order remititur of nearly all of the compensatory damages, show that it had serious questions about the jury's verdict. Nevertheless, under the "stringent scrutiny" standard, and on its own cold reading of the paper record, the court overturned the district court's new trial grant. The standard of review applied by the court of appeals warrants this Court's review.

3. The court of appeals' reinstatement of punitive damages.

The court of appeals reinstated nearly $1 million in punitive damages while remitting or

remanding nearly all of the $33 million compensatory damages award. That ruling is in sharp tension with this Court's holding that there must be a "reasonable relationship" in a punitive damages award's "ratio to the actual harm inflicted on the Plaintiff." *BMW N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 (1996). Respondents suggest that the reinstated punitive damages award is reasonable in light of the ratio between the award and their estimate of the probable compensatory award after remand and remititur. Opp. 30-35. But Respondents do not take into account that the punitive damages award was made by the same jury at the same time as the compensatory damages awards that were found to be excessive. The error that infected the jury's compensatory award most certainly also infected its punitives award.

Moreover, because the compensatory awards have been mostly or entirely overturned, it is meaningless to compare the exemplary award and the eventual compensatory award after remititur and a third damages trial. Because the two awards would be decided by different juries considering different testimony, there can be no "reasonable relationship" between them. The relationship that Respondents suggest is simply a post-hoc numerical comparison, which leaves no basis for determining whether the award meets constitutional muster. This Court has "constantly rejected" the suggestion Respondents now assert, that the constitutionality of a punitive damages award may be measured "by a simple mathematical formula." *BMW*, 517 U.S. at 582.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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